Supreme Court, U.S.
FILED
SEP 10 2007
OFFICE OF THE CLERK

No. 1

07-337

In The

Supreme Court of the United States

SANJAY H. PATEL,

Petitioner,

v.

CONDOLEEZA RICE, In Her Official Capacity As SECRETARY OF STATE,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

KENT F. BROOKS
LAW OFFICE OF KENT F. BROOKS
8117 Preston Rd., Suite 300
Dallas, Texas 75225
(214) 706-9151 – Telephone
(214) 706-9152 – Facsimile

Counsel for Petitioner

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

1. Where Petitioner had a United States passport and a state-issued birth certificate, did the court below err by (a) holding that Petitioner did not thereby show prima facie proof of United States citizenship and (b) not shifting the burden of production and persuasion to the United States to show that Petitioner is not a United States citizen?

2. Where Petitioner lost his passport and could not produce for trial the original documents submitted ten years earlier in support of his birth certificate, did the court below err in holding that such acts and failures were enough to deprive Petitioner of his citizenship?

RULE 29.6 STATEMENT

Pursuant to Supreme Court Rule 29.6, Petitioner states that it has no parent companies or non-wholly-owned subsidiaries.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
RULE 29.6 STATEMENT	ii
TABLE OF CONTENTS	iii
TABLE OF AUTHORITIES	vi
OPINIONS BELOW	1
JURISDICTION	1
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	1
STATEMENT	2
A. There Is a Conflict in the Circuits Regarding Who Bears The Risk of Erroneous Citizenship Determination	2
B. There Is a Conflict Regarding the Evidentiary Weight of Prior Governmental Determinations of the Fact of Citizenship	3
C. There Is an Important Question About the Application of *Afroyim v. Rusk* to Unintentional Acts	3
D. The Court of Appeals' Decision	4
REASONS FOR GRANTING THE PETITION	5
I. The Circuits Are Divided Over Whether the Issuance of a Passport and the Issuance of a Birth Certificate Establish A Prima Facie Case of Citizenship	5
A. This Case Squarely Presents the Conflict	5
B. The Issue Presented by This Conflict Is Recurring and of Great Practical Importance	6

TABLE OF CONTENTS – Continued

		Page
II.	The Decision Below Is Incorrect	7
	A. The Court Below Erred in Concluding That the Issued, Lost Passport And Birth Certificate Are Not Prima Facie Proof of Citizenship	7
	B. The Court Below Erred in Concluding That the Passport Became Invalid When the Report of Its Loss Was Delivered	10
III.	The Decision Below Reflects Uncertainty Over the Meaning and Effect of *Afroyim v. Rusk* and *Vance v. Terrazas*, Which This Court Alone Can Dispel	12
	A. This Case Squarely Presents the Issue	12
	B. The Issue Presented Is Recurring and Of Great Legal and Practical Importance	13
	C. The Decision Below Is Incorrect	13
IV.	The Case Has Decided an Important Question of Federal Law That Has Not Been, but Should Be, Settled by this Court	15
	A. The Issue of What Constitutes Registering a Passport as Lost Is Squarely Before the Court	15
	B. The *Res Nova* Issue Presented Is of Great Practical Importance	16
V.	The Decision Below Reflects Uncertainty Over the Meaning of *Kwock Jan Fat v. White,* Which This Court Alone Can Resolve	17
	A. This Case Squarely Presents the Conflict	17

TABLE OF CONTENTS – Continued

Page

B. The Issue Presented Is of Great Legal and Practical Importance 18

C. The Decision Below Is Incorrect 19

CONCLUSION 22

TABLE OF AUTHORITIES

Page

CASES:

Afroyim v. Rusk, 387 U.S. 253 (1967) ..... *passim*

Delmore v. Brownell, 236 F.2d 598 (3rd Cir. 1956) 5, 8

De Vargas v. Brownell, 251 F.2d 869 (5th Cir. 1958) 8

FDIC v. Meyer, 510 U.S. 471 (1994) 10

Gore, Inc. v. Espy, 87 F.3d 767 (5th Cir. 1996) 10

Kwock Jan Fat v. White, 253 U.S. 454 (1920) ..... *passim*

Mah Toi v. Brownell, 219 F.2d 642 (9th Cir. 1955) 6, 8, 9

Mar Gong v. Brownell, 209 F.2d 448 (9th Cir. 1954) ... 18, 19

Reyes v. Neelly, 264 F.2d 673 (5th Cir. 1959) ..... *passim*

Rivera v. Ashcroft, 394 F.3d 1129 (9th Cir. 2004) 13

TRW, Inc. v. Andrews, 534 U.S. 19 (2001) 10

Vance v. Terrazas, 444 U.S. 252 (1980) 2, 4, 12, 14

Yip Mie Jork v. Dulles, 237 F.2d 383 (9th Cir. 1956) 18, 19, 20

CONSTITUTIONAL AND STATUTORY PROVISIONS:

U.S. CONST. amend. XIV, § 1 ..... 1, 18

8 U.S.C. § 903 6

8 U.S.C. § 1252 14

8 U.S.C. § 1503 ..... *passim*

8 U.S.C. § 1503(a) 3, 5

22 U.S.C. § 2705 ..... 1, 7, 11, 15

TABLE OF AUTHORITIES – Continued

Page

RULES AND REGULATIONS:

22 C.F.R. § 51.4 10

22 C.F.R. § 51.4(h)(2) 1, 10, 11, 15, 16

OTHER AUTHORITIES:

2A SUTHERLAND STATUTORY CONSTRUCTION § 46.06 (5th ed. 1992) 10

BLACK'S LAW DICTIONARY 1153 (5th Ed. 1979) 10

WEBSTER'S NEW WORLD DICTIONARY (2d Ed.) 10

PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

The opinion of the court of appeals (App. 1) is unreported. The opinion of the district court (App. 2-18) is reported at 403 F. Supp. 2d 560.

JURISDICTION

The court of appeals' judgment was entered on April 10, 2007. (App. 1). A timely petition for rehearing was denied on June 11, 2007. (App. 19-20). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Section 1 of the Fourteenth Amendment to the Constitution provides in relevant part: "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside." U.S. CONST. amend. XIV, § 1.

The relevant provisions of 22 U.S.C. § 2705 are reproduced at App. 21. The relevant provisions of 22 C.F.R. § 51.4(h)(2) are reproduced at App. 22.

STATEMENT

This case raises important, recurring questions relating to a person's use of his United States passport and state-issued birth certificate to prove he is a citizen of the United States; the meaning and effect of this Court's opinion in *Kwock Jan Fat v. White,* 253 U.S. 454 (1920) on the burdens of production and persuasion in cases seeking a determination of citizenship under 8 U.S.C. § 1503; and the meaning and effect of this Court's opinions in *Afroyim v. Rusk*, 387 U.S. 253 (1967) and *Vance v. Terrazas*, 444 U.S. 252 (1980) on who bears the burden of proof of intent to relinquish citizenship, what standard of proof is required to deprive one of his citizenship and whether a presumption of relinquishment arises from the loss of a passport.

A. There Is a Conflict in the Circuits Regarding Who Bears The Risk of Erroneous Citizenship Determination.

In 1920, the Court established the proper allocation of the risk arising from an incorrect adjudication of United States citizenship in *Kwock Jan Fat v. White,* 253 U.S. 454 (1920). In such adjudications, the risk of an erroneous decision was to be borne, not by the individual seeking a determination of citizenship, but by the United States. The opinion below raises a conflict in the application of *Kwock Jan Fat.* The Ninth Circuit holds when applying *Kwock Jan Fat* to uncontradicted evidence supporting citizenship, a district court cannot disregard that evidence and the reasonable inferences therefrom that support citizenship without proof to the contrary. The Fifth Circuit has now affirmed a district court's determination that Petitioner failed to meet his burden of proof on citizenship,

where the sole reasonable inference from the uncontradicted evidence is that Petitioner was born in the United States and there is no proof to the contrary.

B. There Is a Conflict Regarding the Evidentiary Weight of Prior Governmental Determinations of the Fact of Citizenship.

The second conflict relates to whether in a declaratory judgment action proof of an unrevoked United States passport previously issued to a person and/or a state-issued birth certificate establishes that person's citizenship by birth, subject to proof to the contrary. The Third Circuit holds that a determination in writing by the Commissioner of the Bureau of Immigration and Naturalization that a person was born in the United States and is a native and citizen of the United States establishes a prima facie case of citizenship in an action under 8 U.S.C. § 1503(a). The Fifth Circuit has now affirmed a district court's determination that relied on prior Fifth Circuit precedent to expressly reject that Third Circuit case and its position.

C. There Is an Important Question About the Application of *Afroyim v. Rusk* to Unintentional Acts.

The third conflict relates to the actions that can cause a citizen to be deprived of citizenship. The Court in *Afroyim v. Rusk* held that rights of citizenship provided under the Citizenship Clause of the Fourteenth Amendment cannot be shifted, canceled or diluted at the will of the Federal Government, the states, of any other unit of government. The Court in *Afroyim v. Rusk* held that as a constitutional right citizenship may be lost only with the

citizen's assent (intent to surrender citizenship). In *Vance v. Terrazas,* the Court noted that proof of intent to renounce citizenship was a "heavy burden" and that the Court had evinced a decided preference for requiring clear and convincing evidence to prove a loss of citizenship, subject to Congress' power to set the standard of proof. The Court also held in *Afroyim v. Rusk* that it was beyond the power of Congress to set certain actions as conclusive proof of intent to relinquish citizenship and in *Vance v. Terrazas* expressly left open whether a presumption of intent would be inconsistent with *Afroyim v. Rusk.*

The court below has deprived Petitioner of citizenship on the failure to produce a lost passport and the original documents sent to a state agency to support his birth certificate. The Court should clarify whether it is constitutionally required that the government bear the burden of proof on the intent issue, whether the proper standard of proof applicable to the government's burden on the issue of intent is clear and convincing (there being no Congressional determination in this regard), whether constitutionally there can be a presumption of such intent, whether a presumption of the intent to relinquish citizenship can arise from the failure of the citizen to offer the original passport and original documents tendered to a state agency at trial and whether such presumption, if it arises, meets the clear and convincing standard, if not rebutted.

D. The Court of Appeals' Decision.

A panel of the court of appeals affirmed, *per curiam.* (App. 1). It did so without oral argument. (App. 1). It

expressly found no error of law or fact in the district court's opinion. (App. 1).

REASONS FOR GRANTING THE PETITION

The decision below creates circuit conflicts as to vitally important, frequently recurring issues of federal law. It also decided important questions of federal law that have not been, but should be, settled by the Supreme Court.

I. The Circuits Are Divided Over Whether the Issuance of a Passport and the Issuance of a Birth Certificate Establish A Prima Facie Case Of Citizenship.

A. This Case Squarely Presents the Conflict.

The Fifth Circuit's decision affirms the district court's judgment which holds that it is doubtful that evidence of an issued passport would be sufficient to satisfy the burden of proof on citizenship in an action under 8 U.S.C. § 1503(a) and gives no weight to a state-issued birth certificate. (App. 8-10). The district court's opinion expressly addresses and rejects the Third Circuit's position set forth in *Delmore v. Brownell*, 236 F.2d 598 (3rd Cir. 1956) that would give weight to the passport, as a determination of citizenship, and require that there be evidence that the person was not born in the United States to defeat the citizenship claim. (App. 6-8).

The Third Circuit stated in *Delmore* that "[o]nce the United States has determined that an individual is a citizen, it should be required to disprove its own determination . . . "

264 F.2d at 601. The district court's opinion that the Fifth Circuit affirmed states " . . . it is doubtful whether issuance of a passport, by itself, would be sufficient to satisfy Patel's burden of persuasion." (App. 8). Therefore, the conflict on this issue is clear. Under the Third Circuit rule, the passport, standing alone, is sufficient to establish citizenship. Not so in the Fifth Circuit.

The district court's judgment expressly states that it must determine the weight to be given the birth certificate and to do so it can consider the documents and information used in support of Petitioner's application for the birth certificate. (App. 9-10). The Ninth Circuit has held in a case under 8 U.S.C. § 903 (now 8 U.S.C. § 1503) that a prior state court judgment that found a person to have been born at a certain time and place within the United States was prima facie evidence of citizenship, sufficient to raise a presumption of the facts, but not conclusive evidence of citizenship. *Mah Toi v. Brownell*, 219 F.2d 642, 644 (9th Cir. 1955). The Ninth Circuit held that the state court determination was prima facie evidence expressly on the basis of authorities that gave such effect to official birth certificates. *Id.* at 644. Therefore, the conflict on this issue is clear. Under the Ninth Circuit rule, a state-issued birth certificate, standing alone, is sufficient to establish citizenship. Not so in the Fifth Circuit.

B. The Issue Presented by This Conflict Is Recurring and of Great Practical Importance.

Whether a person's passport and state-issued birth certificate establish citizenship, subject to affirmative proof to the contrary, is of far-reaching legal and practical significance. As a practical matter, people rely on such documents

as determining their citizenship in making significant life decisions. For example, Petitioner fathered a daughter born in the United States who is a United States citizen. (App. 3). As a legal matter, whether the United States can simply ignore its issuance of a passport, when it wants to, has significant ramifications. So far, a passport is the closest thing to national identity papers that exist. Increasingly stringent requirements for use of passports in travel to foreign countries indicate a Congressional intent that the citizens of the United States get a passport and that they be a reliable form of proof of citizenship at our borders. If the United States can fail to properly and fully investigate passport applications without being obligated to disprove citizenship once a passport is issued, then 22 U.S.C. § 2705 is neither a carrot nor a stick to get passports to be reliable documents of citizenship.

II. The Decision Below Is Incorrect.

A. The Court Below Erred in Concluding That the Issued, Lost Passport And Birth Certificate Are Not Prima Facie Proof of Citizenship.

Section 2705 of 22 U.S.C. is entitled *Documents of citizenship* and provides in pertinent part:

> The following documents shall have the same force and effect as proof of United States citizenship as certificates of naturalization or citizenship issued by the Attorney General or by a court having naturalization jurisdiction:
>
> (1) A passport, during its period of validity (if such period is the maximum period authorized by law), issued by the Secretary of State to a citizen of the United States.

The Third Circuit in *Delmore* noted the policy reason for holding that "[o]nce the United States has determined that an individual is a citizen, it should be required to disprove its own determination . . . " *Delmore v. Brownell*, 236 F.2d 598, 601 (3rd Cir. 1956). It reasoned that if there was error in making the original determination, "the remedy must lie in taking greater care." *Id.* The Third Circuit's position is in keeping with the clear import of § 2705 and affords the best protection to all United States citizens since all passport applications will be carefully checked. It also encourages governmental efficiency, by providing an incentive to get it right the first time.

The district court's holding that " . . . it is doubtful whether issuance of a passport, by itself, would be sufficient to satisfy Patel's burden of persuasion" relies on a quote from *Reyes v. Neelly,* 264 F.2d 673, 675 (5th Cir. 1959), which in turn relied on the Ninth Circuit case of *Mah Toi v. Brownell,* 219 F.2d 642 (9th Cir. 1955) and the prior Fifth Circuit case of *De Vargas v. Brownell,* 251 F.2d 869 (5th Cir. 1958) as its authority (App. 8). *Reyes v. Neelly* is a majority panel opinion that affirmed a district court's denial of a declaratory judgment of citizenship made on findings that the plaintiff, Reyes, was born in a particular town in Mexico and that he was not a national of the United States. *Reyes v. Neelly,* 264 F.2d 673 (5th Cir. 1959). The evidence was that Reyes held elective office in Mexico (raising an inference of Mexican citizenship since that citizenship was a prerequisite to holding such office), he conducted himself as a citizen of Mexico for 56 years and his sister had made a statement that he was a Mexican national. *Id.* at 674.

The Immigration Department had previously issued a certificate of citizenship which Reyes claimed in effect conferred upon him citizenship which gave rise to a presumption that he was a citizen and placed a burden on the defendant government equivalent to that in a denaturalization proceeding. *Id.* at 675. The majority disagreed, but also held that considering the evidence as a whole, Reyes' proof failed and the certificate failed along with it. *Id. Reyes v. Neelly* contains a dissent by Judge Rives arguing that a prima facie showing of citizenship in an action under 8 U.S.C. § 1503 does shift to the government the burden to rebut the fact of citizenship. *Id.* at 675-82. Judge Rives' dissent notes and discusses *Delmore* with approval and distinguishes *Mah Toi v. Brownell. Id.* at 680.

De Vargas v. Brownell provides no authority for the effect of a prior federal (or state) governmental determination of citizenship, because the case did not involve one, much less a passport. *De Vargas v. Brownell,* 251 F.2d 869 (5th Cir. 1958).

The Ninth Circuit in *Mah Toi v. Brownell* actually gave prima facie weight to a finding in a state court judgment that a person was the son of a particular set of parents and born on a certain date in the city and county of San Francisco, State of California. *Mah Toi v. Brownell*, 219 F.2d 642, 644 (9th Cir. 1955). It did so on a statement of the general rule that official birth certificates are prima facie, but not conclusive, evidence of the facts stated therein. *Id.* The court noted that the effect of a prima facie showing was to require that substantial evidence rebutting the presumption be presented to the court. *Id.*

B. The Court Below Erred in Concluding That the Passport Became Invalid When the Report of Its Loss Was Delivered.

The pertinent provision of 22 C.F.R. § 51.4 provides:

> (h) Invalidity. A United States passport is invalid whenever:
>
> (1) The passport has been formally revoked by the [State] Department, or
>
> (2) The [State] Department has registered a passport reported either in writing or by telephone to the Department of State, or in writing to a U.S. passport agency or to a diplomatic or consular post abroad as lost or stolen.

When a regulation does not provide a definition, the Court first determines the ordinary meaning of the undefined term. *FDIC v. Meyer,* 510 U.S. 471, 476 (1994); *accord Gore, Inc. v. Espy*, 87 F.3d 767, 773 (5th Cir. 1996) (applying rule to agency regulation). "Register" means: "to record formally and exactly; to enroll; to enter precisely in a list or the like." *See* WEBSTER'S NEW WORLD DICTIONARY (2d Ed.); *see also* BLACK'S LAW DICTIONARY 1153 (5th Ed. 1979). Simply placing Petitioner's written report of loss in a file when received is not registering the passport as lost.

Equating retention of the written report of loss as registration runs afoul of the rule that construction of a rule or statute should not render any part insignificant, inoperative or superfluous. *TRW, Inc. v. Andrews*, 534 U.S. 19, 31 (2001); *see also* 2A SUTHERLAND STATUTORY CONSTRUCTION § 46.06 (5th ed. 1992). Section 51.4(h)(2) requires both receipt of a written or telephonic report of loss and a formal recordation of the lost passport on a list or

the like. If the receipt of the report is construed to be registration, the requirement of registration is inoperative or superfluous. One need only ask, how can a report by telephone be "registered," since there is nothing tangible to retain in the files, unless registering means placing the passport on a list of some sort?

Also, the requirement of registration, separate and apart from mere receipt of a report that it has been lost, serves several policy functions. First, requiring registration for invalidity encourages the reporting of passports when they are misplaced. If the person to whom the passport is issued subsequently finds the passport, the passport can merely be removed from the registration list (thereby becoming valid) without the delay and expense of the person having to apply for a replacement passport. Second, requiring a list to register a passport as lost for it to lose its status of proof of citizenship facilitates other persons who may want to assure themselves that the passport that they are being shown has not been stolen. Without such a list, those persons will be delayed or thwarted in making this determination.

There was error below in the holding that the passport became invalid under 22 C.F.R. § 51.4(h)(2) on the date Patel reported it lost. Because a lost passport is only invalid if and while registered as such, Petitioner's lost passport was not unworthy of its evidentiary weight as proof of citizenship under 22 U.S.C. § 2705 at the trial on his claim under 8 U.S.C. § 1503.

III. The Decision Below Reflects Uncertainty Over the Meaning and Effect of *Afroyim v. Rusk* and *Vance v. Terrazas*, Which This Court Alone Can Resolve.

A. This Case Squarely Presents the Issue.

The express legal premise of the district court's opinion is that Petitioner by reporting his United States passport as missing invalidated it as proof of citizenship and by not producing *the original* documents he submitted to a state agency to obtain his birth certificate to the government by a pretrial deadline caused the birth certificate to not be given weight. (App. 9-10). The district court then determines that Petitioner's complaint for a declaratory judgment that he is a citizen should be denied. (App. 16-17).

The Court in *Afroyim v. Rusk* held that because citizenship is constitutionally defined by the Fourteenth Amendment it is a constitutional right that may be lost only with the citizen's assent (i.e., an actual intent to surrender citizenship) and that it was beyond the power of Congress to set certain actions as conclusive proof of intent to relinquish citizenship. *Afroyim v. Rusk*, 387 U.S. 253 (1967). The Court in *Vance v. Terrazas* expressly left open whether a presumption of intent would be inconsistent with *Afroyim v. Rusk* and noted that proof of intent to renounce citizenship was a "heavy burden." *Vance v. Terrazas*, 444 U.S. 252 (1980). The Court also noted that it had evinced a decided preference for requiring clear and convincing evidence to prove a loss of citizenship.

The court below has deprived Petitioner of citizenship on the failure to produce a lost passport or the original documents submitted to a state agency to obtain the birth certificate. Whether these acts or omissions are sufficient

to deprive Petitioner of his citizenship consistent with *Afroyim v. Rusk* and *Vance v. Terrazas* is ripe for determination.

B. The Issue Presented Is Recurring and Of Great Legal and Practical Importance.

People lose things all the time. Passports are no exception. Original documents submitted to governmental agencies are not generally retrievable. The practical importance to a citizen of what can cause a loss of citizenship is self-evident. If losing a passport and not producing originals submitted to a state agency with an application for a birth certificate are going to deprive one of citizenship due to lack of evidence, citizens will need to be even more vigilant in safe-keeping these documents. The loss of United States citizenship is catastrophic. It is the loss of the right to have rights. Priceless and irreplaceable.

C. The Decision Below Is Incorrect.

Can the act of losing a passport or noncompliance with a pretrial order by not producing original documents submitted to a state agency in support of an application for a birth certificate be the basis for effectively being declared not a United States citizen? No.

An analogous situation occurred in *Rivera v. Ashcroft*, 394 F.3d 1129 (9th Cir. 2004). Rivera agreed to waive an appeal of a determination by an immigration judge that he did not sufficiently prove that he was a United States citizen. He was subsequently deported. Later, he filed a complaint for a declaratory judgment seeking a determination that he was a United States citizen by birth. The

district court dismissed the complaint on the basis that Rivera had failed to exhaust his exclusive administrative remedy under 8 U.S.C. § 1252 for judicial review of nationality claims.

The Ninth Circuit rejected the argument that by waiving the right to appeal and being deported, Rivera could not seek judicial review of a non-frivolous claim to United States citizenship. It reasoned that if Rivera was in fact a United States citizen, permitting the IJ's determination to stand renders him a stateless person. Further, such a rule would make it possible to unintentionally relinquish citizenship by waiving the right to appeal a deportation order. The Ninth Circuit expressly relied on the Court's substantial Fourteenth Amendment jurisprudence, including the Court's opinions in *Afroyim v. Rusk* and *Vance v. Terrazas*.

The Court in *Afroyim v. Rusk* held that rights of citizenship provided under the Citizenship Clause of the Fourteenth Amendment cannot be shifted, canceled or diluted at the will of the Federal Government, the states, or any other unit of government. But here, a single district court judge has held that the citizenship of an individual to whom a United States passport and state birth certificate have been issued hinges on whether the person lost his passport and can produce at trial original documents submitted to a state agency to get a birth certificate at least ten years prior to that trial. The Court in *Afroyim v. Rusk* held that as a constitutional right citizenship may be lost only with the citizen's assent (intent to surrender citizenship). In *Vance v. Terrazas*, the Court noted that proof of intent to renounce citizenship was a "heavy burden" and that the Court had evinced a decided preference for requiring clear and convincing evidence to prove a

loss of citizenship, subject to Congress' power to set the standard of proof. The Court held in *Afroyim v. Rusk* that it was beyond the power of Congress to set certain actions as conclusive proof of intent to relinquish citizenship and in *Vance v. Terrazas* expressly left open whether a presumption of intent would be inconsistent with *Afroyim v. Rusk*.

The courts below have deprived Petitioner of citizenship on the failure to produce at trial a lost passport or original document submitted ten years before the trial to a state agency to support the birth certificate. Losing a passport and not producing original documents is no evidence of any intent to relinquish citizenship, nor, if it is any evidence of intent, is it clear and convincing evidence of such intent.

IV. The Case Has Decided an Important Question of Federal Law That Has Not Been, but Should Be, Settled by this Court.

A. The Issue of What Constitutes Registering a Passport as Lost Is Squarely Before the Court.

A passport loses its validity as proof of citizenship when a written or telephonic report that the passport is lost is made to certain agencies and the passport is registered by the State Department as lost. *See* 22 C.F.R. § 51.4(h)(2). The Fifth Circuit's decision affirmed a judgment that holds that under 22 C.F.R. § 51.4(h)(2) a lost passport loses its status of proof of citizenship under 22 U.S.C. § 2705 on the date it is reported as lost. (App. 8). That presents a case of first impression on whether the requirement that the State Department also "register" it

as lost is satisfied when the government merely receives and retains the written report of the loss in its files.

B. The *Res Nova* Issue Presented Is of Great Practical Importance.

This is an issue of first impression. The importance to those who seek or are required by law to assure themselves that a person is a United States citizen is immense. If 22 C.F.R. § 51.4(h)(2) does not require the State Department to make a registration list of lost passports for those passports to cease being proof of citizenship, careful individuals and potential employers may reasonably refuse to consider passports as an acceptable document of citizenship, since the "lost" status will not be easily determinable by those individuals. If the Court determines that registration under 22 C.F.R. § 51.4(h)(2) requires the State Department to make a list of lost passports from which it can be determined whether a particular passport has been lost (or stolen), passports will continue to be a reliable document of citizenship.

The importance to United States citizens who travel outside the United States and lose their passport while out of the country is tremendous. If a passport loses its status as proof, immediately upon the making of a written or oral report of loss, then citizens who lose their passport while out of the country will need to carry other sufficient proof of citizenship with them, or risk losing the ability to show that they are United States citizens when they seek to return to the United States. This is a substantial question for the Court.

V. The Decision Below Reflects Uncertainty Over the Meaning of *Kwock Jan Fat v. White*, Which This Court Alone Can Resolve.

A. This Case Squarely Presents the Conflict.

The district court's opinion states: "Patel argues that he presented a prima facie case, thereby shifting to the government the burden of producing evidence that he was born outside the United States or discrediting all his evidence that he was born in the United States." (App. 6). The district court then clearly identifies that the law, as stated in *Reyes v. Neelly*, 264 F.2d 673 (5th Cir. 1959), allowed it to determine the citizenship issue on its belief, or lack of belief, of the evidence of citizenship whether or not the government provided any evidence of birth in any other country or any contradictory evidence to that of Petitioner. (App. 6-7).

The dissent in *Reyes* argued that a plaintiff has the ordinary burden of proving his citizenship by a mere preponderance of the evidence, as in a normal civil case, but once he makes a prima facie case of citizenship the government must rebut that case. *Reyes v. Neelly*, 264 F.2d at 679. The dissent expressly relies on *Kwock Jan Fat v. White* as the basis for arguing that the majority had failed to give the plaintiff's evidence of citizenship presumptive effect. *Id.* at 681.

The Fifth Circuit affirmed the district court's opinion on the law and the facts (App. 1) in the face of Petitioner's challenge that the ignored passport and state birth certificate, along with the uncontroverted record evidence that the district court did not expressly address in its opinion and the uncontradicted portions of the testimony of witnesses whom the district court did not

find not worthy of belief, and the reasonable inferences therefrom, established a prima facie case of citizenship by birth in the United States.

Therefore, the Fifth Circuit's affirmance of the district court's opinion decides important questions of burdens and proof in ways that conflict with the Court's decision in *Kwock Jan Fat v. White,* 253 U.S. 454, 40 S.Ct. 566, 64 L. Ed. 1010 (1920) and with the Ninth Circuit's decisions in *Yip Mie Jork v. Dulles*, 237 F.2d 383 (9th Cir. 1956) and *Mar Gong v. Brownell,* 209 F.2d 448 (9th Cir. 1954). In both Ninth Circuit cases, that court relied on its view of *Kwock Jan Fat v. White* to reverse the district court and render judgment for the plaintiff declaring him a citizen where there was uncontradicted and not inherently improbable evidence to support the fact of citizenship. *Yip Mie Jork v. Dulles*, 237 F.2d at 385; *Mar Gong v. Brownell,* 209 F.2d at 453.

B. The Issue Presented Is of Great Legal and Practical Importance.

Not everyone born within the United States has a mother who gives birth in a hospital and has all the ordinary proof of the fact of that birth. Babies are born to unwed mothers who do not (1) deliver in a hospital, (2) use a licensed doctor or (3) record the birth. Some babies and children are abandoned by their mother. But, under the Fourteenth Amendment if they were born in the United States they are citizens. U.S. CONST., amend. XIV, § 1. How are these individuals going to prove the fact of their birth within the United States many years later after reaching legal majority? At best, it is going to be on less than perfect proof. In fact, the problems of missing documents

(including original documents tendered to state agencies and no longer in the person's possession or control), deceased or lost witnesses and faded memories of past events are inherent in these cases under 8 U.S.C. § 1503.

Kwock Jan Fat v. White strikes the balance in the risk of an erroneous determination of citizenship fully in favor of citizenship. That has been held by the Ninth Circuit to preclude disbelief of evidence of citizenship without contrary proof. The Fifth Circuit operates to the contrary. The Court should clarify whether under *Kwock Jan Fat v. White* a district court can base a citizenship determination on mere disbelief of the evidence supporting citizenship.

C. The Decision Below Is Incorrect.

There is a strong policy in play whenever the status of citizenship is at issue and this policy defines both the district court's ability to merely disbelieve the evidence and the proper appellate review. *Kwock Jan Fat v. White,* 253 U.S. 454, 40 S.Ct. 566, 64 L. Ed. 1010 (1920). "It is better that many Chinese immigrants should be improperly admitted than that one natural born citizen of the United States should be permanently excluded from his country." *Id.* at 464.

This policy of extreme caution and *Kwock Jan Fat* as authority was relied upon by the Ninth Circuit in both *Yip Mie Jork v. Dulles* and *Mar Gong v. Brownell.* In *Mar Gong v. Brownell*, the court candidly stated:

> We recognize all that may be said with respect to the necessity of the court guarding against imposition, but we also are of the view that no special quantum of proof should be exacted from any person claiming American citizenship merely

> because of his racial origin. *In Kwock Jan Fat v. White,* 253 U.S. 454, 464, 40 S.Ct. 566, 570, 64 L. Ed. 1010, the Supreme Court, reversing this court, said: "It is better that many Chinese immigrants should be improperly admitted than that one natural born citizen of the United States should be permanently excluded from his country." 209 F.2d at 453.

In *Yip Mie Jork v. Dulles* the court counseled:

> The fear of being imposed upon by the fraudulent claims of non-citizens must not be allowed to eclipse our primary consideration – the importance of according to each of our true citizens the priceless rights and privileges to which his citizenship entitles him. *Kwock Jan Fat v. White,* 1920, 253 U.S. 454, 40 S. Ct. 566, 64 S. Ct. 1010. 237 F.2d at 385.

The Ninth Circuit in those cases reversed the district court's determinations that the plaintiff had not met his burden of proof on citizenship because the district courts had ignored the core testimony that would support citizenship. The Ninth Circuit position is the reasonable application of the admonition in *Kwock Jan Fat v. White.*

The Fifth Circuit in *Reyes v. Neelly* stated:

> This is another of the many cases, the filing of which the enactment of this statute [8 U.S.C. § 1503], with its opportunity for an independent suit with a trial and decision de novo, has brought about. In these cases, just as it is in other civil cases, the burden of establishing in the trial court the truth of the facts alleged is on the plaintiff. In the same way, in an appeal in such cases, the burden is on the appellant to

> show that the findings of the district judge are clearly erroneous. 264 F.2d at 674.

No mention is made of the need for care to avoid an erroneous determination that the plaintiff, Reyes, is not a citizen. The dissent in *Reyes v. Neelly* argues forcefully that the government should have to rebut Reyes' prima facie showing in any 8 U.S.C. § 1503 case where his claim of citizenship is threatened by some department or agency ruling since it bears an evidentiary burden in denaturalization cases and in 8 U.S.C. § 1503 cases where it seeks to establish that a plaintiff has expatriated himself. 264 F.2d at 678-79.

The Fifth Circuit's position that does not require a rebuttal of a prima facie showing of citizenship ignores the admonition of *Kwock Jan Fat v. White*. Evidence of citizenship that is neither inherently improbable nor contradicted cannot merely be ignored without shifting the entire risk of an erroneous citizenship determination to a plaintiff.

Petitioner's United States passport and state-issued birth certificate constituted plausible, non-contradicted evidence of citizenship by birth in the United States. This same evidence proved his prima facie case by a preponderance of the evidence. There is a complete absence of any evidence that Petitioner was born other than in the United States. The Fifth Circuit's position that a court is free to disbelieve the evidence of citizenship effectively overrules *Kwock Jan Fat v. White*. The Court should reverse the Fifth Circuit and reaffirm *Kwock Jan Fat v. White*.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

KENT F. BROOKS
Bar No. 03070710
LAW OFFICE OF KENT F. BROOKS
8117 Preston Rd., Suite 300
Dallas, TX 75225
(214) 706-9151 – Telephone
(214) 706-9152 – Facsimile

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 06-10122

SANJAY H. PATEL,

Plaintiff-Appellant,

versus

CONDOLEEZZA RICE, in her Official Capacity as Secretary of State,

Defendant-Appellee.

Appeal from the United States District Court
for the Northern District of Texas – Dallas Division
Case No. 3:04-CV-398

(Filed Apr. 10, 2007)

Before JONES, Chief Judge, and HIGGINBOTHAM and CLEMENT, Circuit Judges.

PER CURIAM:*

The court has considered this appeal in light of the briefs and pertinent portions of the record. Finding no error of fact or law, we AFFIRM the judgment of the district court.

AFFIRMED.

* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

SANJAY H. PATEL, Plaintiff, VS. CONDOLEEZZA RICE, in her official capacity as Secretary of State, Defendant.	)	CIVIL ACTION NO. 3:04-CV-0398-G

MEMORANDUM OPINION AND ORDER

Commencing September 19, 2005, a three-day bench trial was held in this case. After review and consideration of all the evidence, the entire record, and the arguments of counsel, the court decides that the plaintiff Sanjay H. Patel ("Patel" or "the plaintiff") has not sustained his burden of proving that he is a United States citizen by birth and that his complaint for a declaratory judgment must therefore be denied.[1] The reasons for this decision are set forth below.

I. BACKGROUND.

Patel claims that he is an American citizen by virtue of having been born in the United States on September 4, 1973, in Chicago, Illinois, and that the Secretary of State has, through her agents at the United States Department

[1] This memorandum opinion constitutes the findings of fact and conclusions of law required by Rule 52(a), F.R. CIV. P.

of State, failed to recognize him as a United States citizen by birth by denying his application for replacement of a lost United States passport. In his sole claim for relief, Patel seeks a declaratory judgment, pursuant to 8 U.S.C. § 1503(a), that he is a United States citizen by birth and, as such, is entitled to a United States passport.

Condoleezza Rice, in her official capacity as Secretary of State ("Rice" or "the secretary" or "the defendant"), avers that Patel has failed to meet his burden of proof that he was in fact born in the United States on September 4, 1973, in Chicago, Illinois. The secretary maintains that Patel's August 10, 1995, application for a United States passport was approved in error and a passport was issued to Patel in violation of departmental passport guidance. The secretary further contends that Patel's complaint for declaratory judgment should be denied for failure to meet his burden of proving, by a preponderance of the evidence, that he is a United States citizen by birth.

The parties have stipulated to the following facts in this case. Patel's father, Harikrushna S. Patel ("Harikrushna"), a native of India, traveled to the United States on August 31, 1973. Joint Pretrial Order, filed September 7, 2005, at 2.

Harikrushna's wife did not travel with him when he came to the United States in August, 1973. *Id.* In 1981, Harikrushna became a naturalized United States citizen. *Id.* DNA tests conducted on the plaintiff and Harikrushna in 2005 confirm that the plaintiff is Harikrushna's biological son. *Id.* at 3. Also, the plaintiff was married in the United States and has a daughter, Sidhdhi Patel, who was born in the United States and is a United States citizen. *Id.*

In 1994, the plaintiff applied to the Illinois Department of Public Health, Division of Vital Records, for a delayed birth certificate. *Id.* On November 28, 1994, a delayed birth certificate was issued to him by the State of Illinois. *Id.* On August 10, 1995, the plaintiff submitted an application for a United States passport based upon United States citizenship by birth. *Id.* In support of his application, Patel submitted his State of Illinois delayed birth certificate, an affidavit of his father, and copies of 1973-1974 medical records from the Chicago Department of Health. *Id.* The State Department issued United States passport number 101963556 to the plaintiff on November 3, 1995. *Id.*

The plaintiff wrote a letter to the passport office, dated February 5, 1996, stating that he had lost his passport. *Id.* On February 6, 1996, the plaintiff applied to the Houston passport office for a new passport. *Id.* At that time, he submitted a form entitled "Statement Regarding Lost or Stolen Passport" along with other documentation. *Id.* The passport office requested additional evidence of the circumstances of his birth. *Id.* at 4. On February 8, 1996, the plaintiff withdrew his application for a new passport in order to gather additional evidence of his United States birth. *Id.*

By letter dated March 3, 1996, the plaintiff provided additional documents to the passport office, but did not submit a new application for a passport. *Id.* On December 27, 2001, the plaintiff submitted a new application for a passport to the passport office in Boston, Massachusetts. *Id.* This application was accompanied by documents. *Id.* On January 2, 2003, the plaintiff submitted another application for a new passport, this time to the Chicago,

Illinois, passport office. *Id.* This application was accompanied by documents.

The plaintiff filed this suit on February 24, 2004, seeking a judicial declaration that he is a United States citizen by birth and entitled to a passport. *Id.* On September 19, 2005, a three-day bench trial commenced. On October 14, 2005, both parties, in compliance with this court's order, submitted post-trial briefs.

II. ANALYSIS

A. *Legal Standards – 8 U.S.C. § 1503*

This is a declaratory judgment action brought pursuant to 8 U.S.C. § 1503(a).

Title 8 U.S.C. § 1503 provides:

> If any person who is within the United States claims a right or privilege as a national of the United States and is denied such right or privilege by any department or independent agency, or official thereof, upon the ground that he is not a national of the United States, such person may institute an action under the provisions of [28 U.S.C § 2201] against the head of such department or independent agency for a judgment declaring him to be a national of the United States, . . .

8 U.S.C. § 1503(a). This court has power to grant the relief sought under 8 U.S.C. § 1503 and 28 U.S.C. § 2201.

In a case properly brought under 8 U.S.C. § 1503, the court must make a *de novo* determination whether the plaintiff is a national of the United States. *Richards v. Secretary of State,* 752 F.2d 1413, 1417 (9th Cir. 1985);

Delmore v. Brownell, 135 F. Supp. 470, 473 (D.N. J. 1955), *aff'd,* 236 F.2d 598 (3d Cir. 1956). The plaintiff bears the burden of establishing, by a preponderance of the evidence, that he is a United States national. *Reyes v. Neelly,* 264 F.2d 673, 674-75 (5th Cir. 1959); *Liacakos v. Kennedy,* 195 F. Supp. 630, 631 (D.D.C. 1961).[2]

B. *Patel's Arguments*

Patel argues that he has established a *prima facie* case of citizenship in two ways, each independently sufficient. First, he urges that the government's issuance to him of a passport in 1995 is *prima facie* evidence of citizenship. Post-Trial Brief of Plaintiff Sanjay H. Patel ("Plaintiffs Post Trial Brief") at 3. Second, he argues that he produced extensive evidence that he was born in Chicago, Illinois. *Id.* at 4.

1. Does the Issuance of a United States Passport Constitute *Prima Facie* Evidence of United States Citizenship?

Patel argues, citing numerous circuit court cases, that proof of a prior determination of citizenship by the government constitutes *prima facie* evidence of citizenship.

[2] Patel argues that he presented a *prima facie* case, thereby shifting to the government the burden of producing evidence that he was born outside the United States or discrediting all of his evidence that he was born in the United States. Post-Trial Brief of Sanjay H. Patel at 2, 10-11, 21. The case law from the Fifth Circuit does not discuss such burden-shifting, and *Reyes v. Neelly*, 264 F.2d 673, 675 (5th Cir. 1959), seems to reject it. The court need not decide whether such burden-shifting occurs, since the parties agree that Patel always retains the burden of persuasion, and the court concludes that Patel has not satisfied that burden.

See *e.g., Lim v. Mitchell,* 431 F.2d 197, 202 (9th Cir. 1970) (certificate of identity as a citizen by Board of Special Inquiry established a *prima facie* case of citizenship; issuance of a U.S. passport "acknowledg[ed] his status as an American citizen."); *Delmore v. Brownell,* 236 F.2d 598, 600 (3rd Cir. 1956) (letter from Commissioner of Immigration that the plaintiff "may properly be regarded a native and citizen of the United States" established the plaintiffs *prima facie* case); *McGrath v. Chung Young,* 188 F.2d 975, 977 (9th Cir. 1951) (prior determination by Board of Special Inquiry of Immigration Service that plaintiff was a citizen established the plaintiffs *prima facie* case); *Choy Yuen Chan v. United States,* 30 F.2d 516, 517 (9th Cir. 1929) (same); *Ah Kong v. Dulles,* 130 F. Supp. 546, 547 (D.N.J. 1955) (certificate of identity issued by Commissioner of Immigration Service established *prima face* case which satisfied the plaintiffs burden of proof). Patel asserts that the State Department's issuance to him of passport number 101963556 ("the passport") on November 3, 1995, constitutes *prima facie* evidence of his citizenship. See *Delmore,* 135 F. Supp. at 474.

Patel's argument, however, is not supported by the facts in this case. The United States Code provides that a passport "during its period of validity" is proof of citizenship to the same extent as a certificate of naturalization or citizenship. 22 U.S.C. § 2705. In this case, Patel's United States passport, issued on November 3, 1995, was not valid at the time of trial. In pertinent part, the code of federal regulations provides, in a section entitled "Validity of passports":

> (h) Invalidity. A United States passport is invalid whenever:

> (1) The passport has been formally revoked by the [State] Department, or
>
> (2) The [State] Department has registered a passport reported either in writing or by telephone to the Department of State, or in writing to a U.S. passport agency or to a diplomatic or consular post abroad as lost or stolen.

22 C.F.R. § 51.4(h).

The passport became invalid on the date Patel reported it lost. The parties stipulated that Patel wrote a letter to the passport office, dated February 5, 1996, stating that he had lost his passport. Joint Pretrial Order at 3; Defense Exhibit 12. Therefore, Patel's passport became invalid on February 5, 1996, the date Patel reported it lost. *See* 22 C.F.R. § 51.4(h)(2).

Even if this passport had not been lost, it is doubtful whether issuance of the passport, by itself, would be sufficient to satisfy Patel's burden of persuasion. See *Reyes,* 264 F.2d at 675 (the plaintiff "stands almost entirely on the proposition that the certificate of citizenship issued by the Immigration Department in effect conferred upon him citizenship which gave rise to the presumption that the plaintiff was a citizen and placed upon the defendant a burden equivalent to that imposed in a denaturalization proceeding. While . . . *Delmore v. Brownell,* [236 F.2d 598 (3d Cir. 1956)], . . . does lend some support to this view, the opinion itself recognizes that it is contrary to . . . *Mah Toi v. Brownell,* [219 F.2d 642 (9th Cir.), *cert. denied,* 350 U.S. 823 (1955)], cited by us with approval in *DeVargas v. Brownell,* [251 F.2d 869 (5th Cir. 1958)], and with which we wholly agree.").

2. Has Patel Presented Proof by a Preponderance of the Evidence That He Was Born in Chicago, Illinois?

Patel argues that the totality of the evidence of his birth in the United States constitutes a *prima facie* case of United States citizenship. Patel's argument is generally based on the following pieces of evidence: 1) the November 28, 1994, Illinois delayed record of birth; 2) the testimony of the plaintiffs father, Harikrushna Patel; 3) the testimony of Mirza Jesani and Ghanshyam Patel; and 4) the records from the Chicago Department of Public Health Uptown Clinic.

a. Delayed Record of Birth

As stated in the memorandum opinion and order denying the defendant's motion for summary judgment, this court must determine the evidentiary value to give Patel's delayed birth certificate. Memorandum Opinion and Order, filed July 25, 2005, at 7. To determine the appropriate evidentiary weight, this court must look to the evidence used to support Patel's application for a delayed record of birth. *Id.* Patel's delayed birth certificate was apparently issued on the basis of two documents. *See* Defendant's Exhibit 1. The first document cited as supporting evidence in the delayed birth certificate is a school record from the Shree Vadyanager High School in Ahmedabad, India. *Id.* The second document cited as supporting evidence is the affidavit of Dr. Dabyabhai S. Patel dated March 11, 1994. *Id.* Neither of these documents was

admitted at trial.[3] Accordingly, because the plaintiff failed to produce the documents used to obtain his delayed record of birth, this court will give no evidentiary weight to Patel's delayed birth certificate.

b. Testimony of Harikrushna Patel

This court finds that Harikrushna Patel's testimony is not credible. Harikrushna has prior convictions for conspiracy, arson, mail fraud, and tampering with a witness. Transcript of Trial Record at 168. Additionally, after he was convicted, Harikrushna fled to India and failed to report for sentencing. *Id.* at 163-64.

Harikrushna's willingness to play fast and loose with the truth was evident at numerous points in his trial testimony. First, when Harikrushna was asked about his employment history in a deposition, he replied that he was "employed" by the Bureau of Prisons in Fort Worth doing data entry work. *Id.* at 164. In reality, of course, Harikrushna was in the custody of the Bureau of Prisons serving a sentence for the convictions set forth above. Then, at trial, Harikrushna attempted to justify this misrepresentation by asserting that he was employed by the Bureau and made a good salary. *Id.* at 165-66. In fact, Harikrushna was assigned to work in Federal Prison Industries

[3] On September 9, 2005, Magistrate Judge Kaplan verbally ordered that the original documents which compromise the plaintiff's exhibits 11, 14-16, and 18 must be produced to the defendant by 4:00 p.m. on September 9, 2005. He further ordered that the original of any such exhibit not so produced could not be offered at the trial of the case. This order was reduced to writing and signed on September 14, 2005. The plaintiff failed to produce the originals of these documents, and they were consequently not admitted at trial. Transcript of Trial Record at 4-10.

(also known by the trade name UNICOR) and earned no more than between $0.23/hr to $1.15/hr. Defendant's Exhibit 41 ¶¶ 3, 4.

Second, Harikrushna testified that Devyani Parmar, the person claimed to be the plaintiff's mother, did not have a passport in 1974. Transcript of Trial Record at 249. Just minutes earlier, however, Harikrushna testified that he knew Devyani Parmar's birth date because he "had occasion to look at her passport." *Id.* at 247.

Third, Harikrushna knowingly misrepresented to the Immigration and Naturalization Service, when he signed his Application for Naturalization on December 11, 1980, that he had no children. *Id.* at 208-09. This misrepresentation was on a sworn document. *Id.* at 209. The court finds that Harikrushna Patel's testimony is not worthy of credence.

c. Testimony of Mirza Jesani and Ghanshyam Patel

The plaintiff argues that the testimony of Dr. Mirza Jesani ("Jesani") and Ghanshyam Patel ("Ghanshyam") establishes the presence of the plaintiffs mother in Chicago at the time of the plaintiffs birth, that the plaintiffs mother was pregnant at the time, and that the two of them saw the plaintiff as a newborn in Chicago shortly after the plaintiffs birth. Plaintiff's Post-Trial Brief at 8. The plaintiff asserts that Jesani's and Ghanshyam's testimony is particularly significant because of their disinterestedness, their clear recall of events in 1973, and the government's failure to discredit their testimony on cross examination. *Id.*

This court disagrees with the plaintiffs assertions regarding Jesani's testimony. First, Jesani is an interested witness. Such testimony is "to be taken with a grain of salt." *De Vargas v. Brownell,* 251 F.2d 869, 871 (5th Cir. 1958). He has been a family friend of Harikrushna, the plaintiffs father, for many years. Transcript of Trial Record at 121-23. Although Jesani testified that his friendship with Harikrushna did not affect his testimony, he acknowledged that he is a family friend trying to help Harikrushna in this matter. *Id.* at 121-22. Second, Jesani does not have a clear recollection of the events in 1973. He admitted that his memory of events in the 1970's is now, understandably, somewhat vague. *Id.* at 115. Third, the government elicited damaging admissions from Jesani on cross examination. Specifically, Jesani agreed that his belief that the plaintiff is the infant he saw in 1973 is based solely on Harikrushna's statements to him. *Id.* at 116-17. Jesani also conceded that his belief that the pregnant woman he saw in 1973 was the biological mother of the plaintiff is likewise founded solely on Harikrushna's statements to him. *Id.* As stated above, Harikrushna's testimony is not worthy of belief. To the extent Jesani's testimony relies on Harikrushna's statements, it must be viewed skeptically and can be given little weight.[4]

For similar reasons, the court is not persuaded by the plaintiff's arguments regarding Ghanshyam's testimony. First, Ghanshyam is an interested witness. He testified

---

[4] The only testimony provided by Jesani probative of whether Patel was born in the United States is that Jesani saw Patel in Chicago just after his birth in 1973. By Jesani's own admission, however, he relied on Harikrushna's assurance that Patel is the baby Jesani saw in 1973. Transcript of Trial Record at 117.

that Harikrushna is a "long good friend." *Id.* at 308. While Ghanshyam did appear to have a reasonably clear recollection of the events in 1973, the government was able to discredit his testimony on cross examination. Ghanshyam testified that he has not seen the plaintiff since 1974. *Id.* Accordingly, he cannot identify Patel from his own personal knowledge as the baby he saw in 1974. Because the court finds that the testimony of Harikrushna is not credible, Ghanshyam's testimony – based on Harikrushna's statements to him that the baby Ghanshyam saw in 1974 is the same person as Patel – is not credible either.

This court finds that the testimony of both Jesani and Ghanshyam relies on statements made to them by Harikrushna. Because Harikrushna is not credible, the court finds that the testimony of Jesani and Ghanshyam – that they saw the plaintiff in the United States in 1973 or 1974 – cannot be credited either.

d. Records from the Chicago Department of Health Uptown Clinic

In support of the plaintiffs passport applications, Patel submitted medical records from the Chicago Department of Health Uptown Clinic ("Uptown Clinic"). *See* Plaintiff's Exhibit 13 at 5-7, 17, 19-31, 39, 43. Additionally, the plaintiff offered these medical records into evidence in his case-in-chief as Exhibits 8 and 19. *See* Plaintiff's Exhibits 8, 19. These records purport to be the plaintiff's initial physical examination record, patient name plate, initial problem list and plan record, patient program of care status log, immunization records, pediatric health maintenance flowsheet, Subjective Objective Assessment Plan ("SOAP") sheets, medication sheet, pediatric health history record, child and family medical

history record, self administered environmental history record, problem list record, patient identification record financial data sheet, payment record, school immunization certificate, boys: 2 to 18 years physical grown NCHS percentiles chart, boys: prepubescent physical growth NCHS percentiles chart, boys: birth to 36 months physical growth NCHS percentiles chart, and a copy of the Uptown Clinic medical records folder. Generally, these documents support the assertion that the plaintiff was born in Chicago, Illinois, on September 4, 1973. At first glance, the records appear to have certain indicia of reliability. They appear to have been created close in time to the alleged event in question, *viz.*, the plaintiffs birth. Also, they appear to have been created by a disinterested party, the Chicago Department of Health Uptown Clinic.

C. *The Government's Evidence*

The government discredited these medical records, however, through the testimony of Sharon Buffalo ("Buffalo"), the Administrator for the Chicago Department of Health. Transcript of Trial Record at 413. This court finds Buffalo credible. Buffalo is a disinterested party. She has personal knowledge with regard to medical records at the Uptown Clinic, and she has worked for the Chicago Department of Health for over twenty-seven years, and for the Uptown Clinic since '1995, [or] 1996." *Id.* at 414. These records were discredited in several convincing ways.

First, the Uptown Clinic records that Patel offered as evidence of his 1973 birth did not exist in 1973. The "Chicago Department of Health-Immunization record," a document submitted by Patel to the State Department as proving that he received immunizations in the United

States as early as November 18, 1973, *see* Plaintiff's Exhibits 8 (at 27A), 13 (at 6), 19 (at 5), was not used by the Chicago Department of Health prior to 1993. Transcript of Trial Record at 426-27, 465, 521. Moreover, the manner in which the plaintiff's "Chicago Department of Public Health Immunization Record" was completed is not consistent with the Uptown Clinic procedure for completion of that form. *Id.* at 462-64, 497-98. The signature of the medical provider is not correctly placed and the signatures shown on the form are unknown to the Uptown Clinic as the signature of any physician who has ever worked at the Uptown Clinic. *Id.* at 434-35, 447-49.

Second, the "boys: birth to 36 months physical growth NCHS percentiles" chart used by Patel to support his claim was not available from Ross Laboratories until 1976, three years after Patel's alleged birth, and could not have been used to record growth information for Patel. See *Id.* at 430-31; Plaintiffs Exhibit 19 at 7.

Third, the "Chicago Department of Public Health Patient Identification Record Financial Data Sheet," Plaintiff's Exhibit 8 at 17, contains an inquiry about "MPE Info." "MPE" refers to "Medicaid Program Eligibility," a state program which did not exist in Illinois before April 1, 1990. This form thus could not have been completed on February 3, 1974, as Harikrushna testified. Transcript of Trial Record at 433-34, 527-28.

Fourth, the plaintiff represented that his Exhibit 13, pp. 5-7, 17, 19-31, 39, Uptown Clinic patient records with the name "Sanjay Patel" and the registration number of "078262," were his records with a patient number given to him in 1973. Transcript of Trial Record at 59-60, 91. These representations, however, do not withstand scrutiny. The

Uptown Clinic Log for registered patients established that May 2, 1978, was the first time the name "Sanjay Patel" and the number "078262" were used as a patient registration number. *Id.* at 416-18, 428-29, 457, 461-62. If the plaintiff had been a registered patient of the Uptown Clinic in 1973-1974, his registration number would have been significantly lower. *Id.* at 429.

Fifth, Patel offered the "Pediatric Health Maintenance Flow Sheet" as one of his Uptown Clinic medical records. Plaintiff's Exhibit 19 at 23; Defendant's Exhibit 30 at 23. However, Buffalo confirmed that the document shows that it did not come into use prior to 1993. *Id.* at 435-36, 492-93.

Sixth, Patel offered the "Immunization Record" as an Uptown Clinic record created for him. Plaintiffs Exhibit 20; Defendant's Exhibit 33. However, that "Immunization Record" is the 1992 version, not one used in 1973. Transcript of Trial Record at 442-44, 500-01. Buffalo testified that Patel's exhibit, if it had been created by the Uptown Clinic, would have had immunization information recorded on the reverse side by a nurse. *Id.*

The plaintiff has failed to demonstrate that the Uptown Clinic records, which purport to show that he was treated there as an infant in 1973-1974, are genuine and worthy of belief.

III. CONCLUSION

For the above reasons, the court concludes that the government has discredited the plaintiffs evidence, and that the plaintiff has failed to meet his overall burden of

proving, by a preponderance of the evidence, that he was born in the United States.

Judgment will be entered denying the plaintiff's claim for declaratory relief. Costs will be taxed against the plaintiff.

SO ORDERED

November 15, 2005.

/s/ A. Joe Fish
A. JOE FISH
CHIEF JUDGE

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

SANJAY H. PATEL, Plaintiff, VS. CONDOLEEZZA RICE, in her official capacity as Secretary of State, Defendant.	)	CIVIL ACTION NO. 3:04-CV-0398-G

JUDGMENT

This judgment is entered pursuant to F.R. Civ P. 58 and the memorandum opinion and order of this date. For the reasons stated in that memorandum opinion and order, it is **ORDERED** that the plaintiff's complaint for a declaratory judgment is **DENIED** and that the defendant recover her costs of the court.

November 15, 2005.

/s/ A. Joe Fish
A. JOE FISH
CHIEF JUDGE

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 06-10122

SANJAY H PATEL

Plaintiff-Appellant

v.

CONDOLEEZZA RICE, in her official capacity as Secretary of State

Defendant-Appelle[e]

Appeal from the United States District Court
for the Northern District of Texas, Dallas

ON PETITION FOR REHEARING EN BANC

(Filed Jun. 11, 2007)

(Opinion 4/10/07, 5 Cir., ___, ___ F.3d ___)

Before JONES, Chief Judge, and HIGGINBOTHAM, and CLEMENT, Circuit Judges.

PER CURIAM:

(✓) Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. No member of the panel nor judge in regular active service of the court having requested that the court be polled on Rehearing En Banc (FED. R. APP. P. and 5th CIR. R. 35), the Petition for Rehearing En Banc is DENIED.

( ) Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. The court having been polled at the request of one of the members of the court and a majority of the judges who are in regular active service and not disqualified not having voted in favor (FED. R. APP. P. and 5th CIR. R. 35), the Petition for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/ [Illegible]
United States Circuit Judge

REHG-6a

CLERKS NOTE:

SEE FRAP AND LOCAL RULES 41 FOR STAY OF THE MANDATE.

22 U.S.C. § **2705.** Documentation of citizenship

The following documents shall have the same force and effect as proof of United States citizenship as certificates of naturalization or of citizenship issued by the Attorney General or by a court having naturalization jurisdiction:

(1) A passport, during its period of validity (if such period is the maximum period authorized by law), issued by the Secretary of State to a citizen of the United States.

(2) The report, designated as a "Report of Birth Abroad of a Citizen of the United States", issued by a consular officer to document a citizen born abroad. For purposes of this paragraph, the term "consular officer" includes any United States citizen employee of the Department of State who is designated by the Secretary of State to adjudicate nationality abroad pursuant to such regulations as the Secretary may prescribe.

22 C.F.R. § 51.4 Validity of passports.

(h) Invalidity. A United States passport is invalid whenever:

(1) The passport has been formally revoked by the Department; or

(2) The Department has registered a passport reported either in writing or by telephone to the Department of State, or in writing to a U.S. passport agency or to a diplomatic or consular post abroad as lost or stolen.

(3) The Department has sent a written notice to the bearer at the bearer's last known address that the passport has been invalidated because the Department has not received the applicable fees.

OPPOSITION BRIEF

JAN 2 2008
OFFICE OF THE CLERK

2

No. 07-337

In the Supreme Court of the United States

SANJAY H. PATEL, PETITIONER

v.

CONDOLEEZA RICE, SECRETARY OF STATE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

PAUL D. CLEMENT
Solicitor General
Counsel of Record
JEFFREY S. BUCHOLTZ
Acting Assistant Attorney General
DONALD E. KEENER
JENNIFER J. KEENEY
Attorneys
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTION PRESENTED

Whether the court of appeals correctly affirmed the district court's denial of petitioner's claim for a declaratory judgment that he was a United States citizen by birth.

TABLE OF CONTENTS

Page

Opinions below 1
Jurisdiction 1
Statement 1
Argument 7
Conclusion 15

TABLE OF AUTHORITIES

Cases:

Afroyim v. *Rusk*, 387 U.S. 253 (1967) 13
Atem v. *Ashcroft*, 312 F. Supp. 2d 792 (E.D. Va. 2004) ... 8
Davis v. *Alaska*, 415 U.S. 308 (1974) 12
Delmore v. *Brownell*, 236 F.2d 598 (3d Cir. 1956) 8
Demarest v. *Manspeaker*, 498 U.S. 184 (1991) 13
De Vargas v. *Brownell*, 251 F.2d 869 (5th Cir. 1958) 8
Gonzales v. *Duenas-Alvarez*, 127 S. Ct. 815 (2007) 8, 13, 15
Heller v. *Doe*, 509 U.S. 312 (1993) 13
Kwock Jan Fat v. *White*, 253 U.S. 454 (1920) 10, 11
Lee Hon Lung v. *Dulles*, 261 F.2d 719 (9th Cir. 1958) 9
Mah Toi v. *Brownell*, 219 F.2d 642 (9th Cir. 1955) 8
Mar Gong v. *Brownell*, 209 F.2d 448 (9th Cir. 1954) . 10, 11
Montana v. *Rogers*, 278 F.2d 68 (7th Cir. 1960) 9
Reyes v. *Neelly*, 264 F.2d 673 (5th Cir. 1959) 4, 9
Rivera v. *Ashcroft*, 394 F.3d 1129 (9th Cir. 2005) 14
United States v. *Ghaloub*, 385 F.2d 567 (2d Cir. 1966) .. 8, 9
Vance v. *Terrazas*, 444 U.S. 252 (1980) 13
Yip Mie Jork v. *Dulles*, 237 F.2d 383 (9th Cir. 1956) . 10, 11

Statutes and regulation: Page

8 U.S.C. 1481(a)(2) 13
8 U.S.C. 1503(a) 1, 2
22 U.S.C. 2705 ..... 2, 4
28 U.S.C. 2201 2
28 U.S.C. 2241 14
22 C.F.R.:
Section 51.4(h) 2, 8, 14, 15
Section 51.4(h)(2) 4

In the Supreme Court of the United States

No. 07-337

SANJAY H. PATEL, PETITIONER

v.

CONDOLEEZA RICE, SECRETARY OF STATE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1) is unreported. The decision of the district court (Pet. App. 2-18) is reported at 403 F. Supp. 2d 560.

JURISDICTION

The judgment of the court of appeals was entered on April 10, 2007. A petition for rehearing was denied on June 11, 2007 (Pet. App. 19-20). The petition for a writ of certiorari was filed on September 10, 2007 (Monday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. a. Pursuant to 8 U.S.C. 1503(a), an individual who is within the United States and claims "a right or privilege as a national of the United States and is denied such

right or privilege by any department or independent agency, or official thereof, upon the ground that he is not a national of the United States * * * may institute an action [under 28 U.S.C. 2201] against the head of such department or independent agency for a judgment declaring him to be a national of the United States." The action must be filed in district court within five years after the final administrative denial of a right or privilege as a national of the United States. 8 U.S.C. 1503(a).

b. Under 22 U.S.C. 2705, a "passport, during its period of validity * * * , issued by the Secretary of State to a citizen of the United States" shall have the same force and effect as proof of United States citizenship as a certificate of naturalization issued by the Attorney General or a court having naturalization jurisdiction. A United States passport is invalid whenever the passport has been formally revoked by the Department of State or whenever the Department of State "has registered a passport reported either in writing or by telephone to the Department of State, or in writing to a [United States] passport agency or to a diplomatic or consular post abroad as lost or stolen." 22 C.F.R. 51.4(h).

2. a. Petitioner asserts he is a United States citizen by virtue of having been born on September 4, 1973, in Chicago, Illinois. Pet. App. 2. The Department of State denied petitioner's application for a replacement of a lost United States passport because he did not meet his burden of proving that he was born in the United States and because petitioner's prior passport, issued in 1995, was approved in error. *Id.* at 3.

On February 24, 2004, petitioner sought a declaratory judgment in the district court that he is a United States citizen by birth and is entitled to a United States passport. Pet. App. 3, 5. The parties stipulated to the follow-

ing facts before the district court. Petitioner's biological father, Harikrushna S. Patel (Harikrushna), a native of India, traveled to the United States on August 31, 1973, without his wife and became a naturalized United States citizen in 1981. *Id.* at 3. Petitioner was married in the United States and has a daughter who was born in the United States. *Ibid.* In 1994, petitioner applied for and received a delayed birth certificate issued by the State of Illinois. *Id.* at 4. On August 10, 1995, petitioner applied for a United States passport and claimed United States citizenship by birth. *Ibid.* In support of the application, petitioner submitted the Illinois delayed birth certificate, an affidavit from Harikrushna, and copies of what were represented to be medical records from the Chicago Department of Health from 1973 and 1974. *Ibid.* On November 3, 1995, the Department of State issued petitioner a United States passport. *Ibid.*

On February 5, 1996, petitioner wrote a letter to the passport office indicating his passport was lost. Pet. App. 4. The next day, petitioner applied to the Houston passport office for a new passport. *Ibid.* The passport office requested additional evidence of the circumstances of petitioner's birth; petitioner withdrew his application in order to gather the requested evidence. *Ibid.* On March 3, 1996, petitioner provided additional documents to the passport office but did not submit a new passport application. *Ibid.* Over five years later, on December 27, 2001, petitioner submitted a new passport application with accompanying documents to the Boston passport office. *Ibid.* On January 3, 2003, petitioner submitted another application for a new passport with accompanying documents to the Chicago passport office. *Id.* at 4-5.

b. Beginning on September 19, 2005, the district court conducted a three-day bench trial on petitioner's

request for declaratory relief. Pet. App. 5. Petitioner presented the testimony of Harikrushna, Mirza Jesani (Jesani), and Ghanshyam Patel (Ghanshyam). *Id.* at 9. Petitioner also relied on his prior passport, his Illinois delayed birth certificate, and the purported records from the Chicago Department of Public Health Uptown Clinic. *Id.* at 6, 9. The government presented the testimony of Sharon Buffalo, the Administrator for the Chicago Department of Health. *Id.* at 14. On November 15, 2005, after receiving post-trial briefs, the district court denied petitioner's request for declaratory relief. *Id.* at 17. The district court concluded that the government had "discredited [petitioner's] evidence, and that [petitioner] ha[d] failed to meet his overall burden of proving, by a preponderance of the evidence, that he was born in the United States." *Id.* at 16-17.

The district court rejected petitioner's argument that his lost passport was prima facie evidence of his citizenship. Pet. App. 6-7. The court noted that by statute, a passport is proof of citizenship only "during its period of validity," *id.* at 7 (citing 22 U.S.C. 2705), and that petitioner's passport "was not valid at the time of trial" because it had been reported lost over nine years earlier, *id.* at 8 (citing 22 C.F.R. 51.4(h)(2)). The district court also doubted "whether issuance of the passport, by itself, would be sufficient to satisfy [petitioner's] burden of persuasion." *Ibid.* (citing *Reyes* v. *Neelly*, 264 F.2d 673, 675 (5th Cir. 1959)).

The district court also rejected petitioner's argument that the totality of the evidence presented at trial established a prima facie case of petitioner's citizenship. Pet. App. 9-16. The court first concluded that the weight to be accorded the Illinois delayed birth certificate depended upon the evidence petitioner relied upon to obtain

it. *Id.* at 9. The court noted that the certificate "apparently" had been issued based on two documents, a record from a high school in India and an affidavit from a Dr. Dabyabhai S. Patel. *Ibid.* Petitioner had been ordered by a magistrate judge to produce the originals of those documents in order to rely upon them at trial, but had failed to do so. *Id.* at 10 n.3. The district court therefore gave "no evidentiary weight to [petitioner's] delayed birth certificate." *Id.* at 10.

The district court found that the testimony of petitioner's father, Harikrushna, was "not worthy of credence." Pet. App. 10. The district court noted that Harikrushna had prior convictions for conspiracy, arson, mail fraud, and tampering with a witness, and that he had fled to India before his sentencing. *Ibid.* The district court also recited specific instances in which Harikrushna's trial testimony was misleading or inconsistent, and observed as well that Harikrushna had misrepresented in his sworn application for naturalization that he had no children. *Id.* at 10-11.

The district court determined that witness Jesani, a long-time family friend of Harikrushna, was "an interested witness." Pet. App. 12. In addition, Jesani admitted that his memory of the relevant events from the 1970s was "somewhat vague." *Ibid.* Jesani conceded on cross-examination that his belief that, in 1973 in Chicago, he saw petitioner's pregnant biological mother and petitioner as an infant was "based solely on Harikrushna's statements to him." *Ibid.* Because the court had discredited Harikrushna's testimony, it determined that Jesani's testimony "must be viewed skeptically and can be given little weight." *Ibid.*

Similarly, the district court ruled that witness Ghanshyam was an "interested" witness by virtue of his long-

time friendship with Harikrushna. Pet. App. 12-13. Ghanshyam also conceded on cross-examination that he had not seen petitioner since 1974. *Id.* at 13. Because Ghanshyam's testimony, like Jesani's, was based on Harikrushna's statements concerning petitioner's identity, the district court likewise did not credit Ghanshyam's testimony. *Ibid.*

Finally, the district court found that the authenticity of the medical records from the Chicago Department of Health, which purported to show that petitioner was treated as an infant in Chicago in 1973 and 1974, was discredited by the testimony of the government's witness, Ms. Buffalo, the Administrator for the Chicago Department of Health.[1] Pet. App. 13-16. Ms. Buffalo testified that certain records petitioner submitted "did not exist in 1973." *Id.* at 14-16. Other documents were not completed in a manner consistent with the clinic's procedures, and one bore the signature of someone who had never been affiliated with the clinic. *Id.* at 15. One document referred to an Illinois state program that did not exist until 1990. *Ibid.* An immunization record relied on by petitioner was the 1992 version. *Id.* at 16. Because of these discrepancies, the district court concluded that petitioner had failed to demonstrate that the medical records were "genuine and worthy of belief." *Ibid.*

c. Petitioner appealed the district court's decision to the Fifth Circuit. Petitioner contended that the district court erred by (1) denying relief when it was "plausible" petitioner was born in Chicago and no evidence showed he was born elsewhere; (2) discrediting three pages of the Chicago medical records; (3) considering certain of

---

[1] Those medical records were the same documents petitioner submitted in support of his passport applications. Pet. App. 13.

Harikrushna's convictions; and (4) giving no weight to petitioner's prior passport. Pet. C.A. Br. 10-33. The court of appeals found "no error of fact or law" and affirmed. Pet. App. 1.

ARGUMENT

Petitioner raises assorted challenges to the Fifth Circuit's unpublished per curiam affirmance of the district court's ruling. Some of petitioner's claims are raised for the first time in this Court and warrant no review on that basis. None of petitioner's contentions concerns any conflict among the circuits or otherwise merits review by this Court.

1. Petitioner contends (Pet. 5-9) that the Fifth Circuit's decision creates a conflict among the circuits on the question whether a previously-issued passport and a birth certificate constitute prima facie evidence of citizenship. Petitioner demonstrates no such conflict and, in any event, that narrow question does not warrant the Court's review.

To the extent petitioner seeks to address any issue concerning the evidentiary value of his delayed birth certificate issued by the State of Illinois in 1994, petitioner abandoned that claim in the court of appeals. Petitioner raised no challenge in that court to the district court's ruling that petitioner's delayed birth certificate would receive "no evidentiary weight" because petitioner had failed to produce the original documents supporting his application for the certificate, as the magistrate judge had ordered. Pet. C.A. Br. 8 (conceding that the district court refused to give any weight to some evidence admitted at trial and arguing only that other evidence established petitioner's citizenship). The Court does not con-

sider questions not addressed by the court below. See *Gonzales* v. *Duenas-Alvarez*, 127 S. Ct. 815, 823 (2007).

With respect to petitioner's lost passport, the district court did not err in concluding that it did not constitute prima facie evidence of petitioner's citizenship. The passport had been reported lost nine years previously. It thus was not valid under 22 C.F.R. 51.4(h) and, under 22 U.S.C. 2705, did not constitute proof of United States citizenship. See *Atem* v. *Ashcroft*, 312 F. Supp. 2d 792, 801 (E.D. Va. 2004) (because passport was revoked by the Department of State and thus was invalid, petitioner "plainly may no longer rely" on it as proof of United States citizenship).

Moreover, petitioner demonstrates no conflict among the circuits on the question whether an invalid passport constitutes prima facie evidence of citizenship. Petitioner cites *Delmore* v. *Brownell*, 236 F.2d 598 (3d Cir. 1956), but that case did not involve a passport at all. It involved a letter written by the Commissioner of Immigration stating that it was "the view of the Service" that the plaintiff could "properly be regarded a native and citizen of the United States." *Id.* at 600. The Third Circuit held that the letter established a prima facie case of citizenship and that the government was required "to disprove its own determination by 'clear, unequivocal, and convincing evidence.'" *Ibid.*[2] Nor has any other

---

[2] A plaintiff seeking a declaratory judgment of citizenship bears the burden of proving citizenship by a preponderance of the evidence. See *United States* v. *Ghaloub*, 385 F.2d 567, 570 (2d Cir. 1966); *De Vargas* v. *Brownell*, 251 F.2d 869, 871 (5th Cir. 1958); *Mah Toi* v. *Brownell*, 219 F.2d 642, 643 (9th Cir. 1955). Like the Third Circuit, the Second and Ninth Circuits have held that when a plaintiff establishes a prior governmental determination of citizenship, the government must overcome that prima facie case by showing that the prior administrative determi-

court of appeals addressed the question whether an invalid passport constitutes prima facie evidence of citizenship. That issue therefore does not warrant review by this Court.

Review of that issue is particularly unwarranted in this case, because the burden-shifting rule urged by petitioner would have no effect on the result. Even if the government's previous issuance of a passport to petitioner were considered prima facie evidence of petitioner's citizenship, the government satisfied any burden it could have had to rebut that evidence by demonstrating that the passport was issued in error or was fraudulently obtained. See *Ghaloub*, 385 F.2d at 570 (where plaintiff seeking declaration of citizenship shows prior governmental determination of citizenship, government must show that prior administrative determination was erroneous); *Montana* v. *Rogers*, 278 F.2d 68, 72 (7th Cir. 1960) (if plaintiff's prior admission to United States as a citizen was sufficient to establish prima facie case of citizenship, "it was rebutted convincingly by the showing that the Immigration officers committed legal error"); *Lee Hon Lung* v. *Dulles*, 261 F.2d 719, 720 (9th Cir. 1958) (plaintiff established prima facie case of citizenship by showing prior admission to United States as an American citizen, but government was entitled to overcome the

---

nation was erroneous or obtained by fraud. See *Ghaloub*, 385 F.2d at 570; *Lee Hon Lung* v. *Dulles*, 261 F.2d 719, 720 (9th Cir. 1958). In *Reyes*, cited by the district court in this case (see Pet. App. 8), the Fifth Circuit rejected a burden-shifting rule and instead viewed the record evidence as a whole, including the evidence on which a previously-issued certificate of citizenship was based, to assess whether the plaintiff carried his burden of establishing citizenship. *Reyes* v. *Neelly*, 264 F.2d 673, 675 (5th Cir. 1959).

prima facie case by showing that prior determination "had been obtained by fraud or error").

The evidence before the district court established that the materials submitted by petitioner in support of his original passport application—the Illinois delayed birth certificate, an affidavit from petitioner's father, and the purported medical records from the Chicago Department of Health—were unreliable, if not fraudulent. Petitioner was unable or unwilling to produce the original documents that led to issuance of the delayed birth certificate. Pet. App. 9-10. The district court determined, based on the in-court testimony of Harikrushna, that he was not worthy of belief. *Id.* at 10-11. And the government presented abundant evidence, credited by the district court, that the purported Chicago medical records from 1973 and 1974 were created years later. *Id.* at 13-16. Indeed, the district court found no need to address whether the evidence of citizenship relied upon by petitioner shifted to the government a burden to rebut that evidence, because even if it did, petitioner retained the ultimate burden of persuasion and failed to satisfy that burden. *Id.* at 6 n.2. This same reasoning counsels against review by this Court of the narrow, and ultimately inconsequential, issue presented by petitioner.

2. Petitioner asserts (Pet. 17-21) that the "Fifth Circuit's affirmance of the district court's opinion decides important questions of burdens and proof in ways that conflict with" *Kwock Jan Fat* v. *White*, 253 U.S. 454 (1920), *Yip Mie Jork* v. *Dulles*, 237 F.2d 383 (9th Cir. 1956), and *Mar Gong* v. *Brownell*, 209 F.2d 448 (9th Cir. 1954). That contention lacks merit.

As already noted, the Fifth Circuit did not decide any "important question[ ] of burdens and proof" in this case. It affirmed the judgment of the district court without

discussion, and the district court expressly *declined* to decide whether petitioner's evidence shifted a burden to the government. Thus, the premise of petitioner's argument lacks record support.

Moreover, the decisions on which petitioner relies did not address burdens of proof. They instead involved fact-bound claims of procedural unfairness and provide no justification for further review in this case. In *Kwock Jan Fat*, the petitioner had departed the United States for a temporary visit to China after securing from the Commissioner of Immigration in San Francisco a formal determination that he was a United States citizen by birth. 253 U.S. at 455-456. The Commissioner's determination followed an "elaborate investigation," including testimony by multiple witnesses. *Id.* at 455. During the petitioner's absence from the United States, however, officials in the same immigration office initiated a new investigation based on anonymous information. *Id.* at 456. After hearing further testimony from witnesses for and against the petitioner, the Commissioner denied the petitioner readmission to the United States based on a finding that the petitioner's citizenship claim was not established to the Commissioner's "satisfaction." *Ibid.*

In ordering that a petition for a writ of habeas corpus issue, this Court found that critical testimony that supported the petitioner's claim of citizenship was never provided to the Commissioner who denied the petitioner readmission to the United States. *Kwock Jan Fat*, 253 U.S. at 463-464. The Court concluded that "a report which suppressed or omitted [that testimony] was not a fair report and a hearing based upon it was not a fair hearing." *Id.* at 464.

The Ninth Circuit cases upon which petitioner relies also involved fact-bound claims of unfairness in the pro-

ceedings. In *Yip Mie Jork*, *supra*, the Ninth Circuit reversed the denial of the appellant's request for a declaratory judgment that he was a United States citizen because the district court had based its ruling on "mere conjecture" and had discredited witnesses "without good reason." 237 F.2d at 385. In *Mar Gong*, *supra*, the Ninth Circuit reversed a district court decision that had based the denial of declaratory relief on evidence it had received in "similar cases" involving Chinese individuals that "followed a certain pattern." 209 F.2d at 450. The Ninth Circuit ruled that the district court "should not have given weight to its experiences, unfortunate as they may have been, in other cases, in arriving at its findings with respect to this appellant." *Id.* at 453.

Petitioner demonstrates no conflict between the fact-bound determinations in those cases and the Fifth Circuit's summary affirmance here. The district court in this case fully explained the adverse credibility determinations it made with respect to petitioner's witnesses, and those determinations were based on proper considerations, such as bias, demeanor, and prior criminal convictions. See *Davis* v. *Alaska*, 415 U.S. 308, 316 (1974) (through cross-examination, witness may be discredited by introducing evidence of a prior criminal conviction, or by questioning directed toward revealing the witness's motive to testify). There is no allegation in this case, as there was in *Kwock Jan Fat*, that petitioner's claim was adjudicated on an incomplete record. And, unlike any of the cases relied upon by petitioner, the district court here received substantial evidence that petitioner's claim of United States citizenship was based on fraudulent documents. Petitioner's assertion (Pet. 21) that the Fifth Circuit has "effectively overrule[d]" *Kwock Jan Fat* is without merit.

3. Petitioner also seeks review (Pet. 12-15) of the question whether this Court's decisions in *Afroyim* v. *Rusk*, 387 U.S. 253 (1967), and *Vance* v. *Terrazas*, 444 U.S. 252 (1980), prohibited the Fifth Circuit from "depriv[ing] Petitioner of citizenship" based on his failure to produce at trial his lost passport or the original documents submitted in support of the Illinois delayed birth certificate. This argument was not raised in the court of appeals, and review therefore is unwarranted. See, *e.g.*, *Gonzales*, 127 S. Ct. at 823; *Heller* v. *Doe*, 509 U.S. 312, 319 (1993); *Demarest* v. *Manspeaker*, 498 U.S. 184, 188-189 (1991).

Petitioner's argument also is without merit. *Afroyim* and *Vance* both addressed proceedings in which the government *conceded* that the individuals in question had been United States citizens, but sought to show that those individuals had relinquished their citizenship by engaging in expatriating acts. In *Afroyim*, the Court held that the Fourteenth Amendment prevents Congress from "enact[ing] a law stripping an American of his citizenship which he has never voluntarily renounced or given up." 387 U.S. at 256. In *Vance*, the Court held that to establish loss of citizenship under 8 U.S.C. 1481(a)(2), the government must prove that "the citizen not only voluntarily committed the expatriating act prescribed in the statute, but also intended to relinquish his citizenship." 444 U.S. at 546.

Unlike *Afroyim* and *Vance*, petitioner's case arose not in a proceeding to establish relinquishment of citizenship where prior citizenship status was conceded by the government, but in a declaratory judgment action in which petitioner's claim of citizenship in the first place was disputed and in which petitioner bore the burden of proof. Moreover, contrary to petitioner's assertions (Pet. 12-

15), the district court did not deny petitioner relief merely because he lost his passport and failed to produce the original documents submitted in support of his delayed birth certificate. The district court found that the government had "discredited" petitioner's claim that he was born in the United States, both through cross-examination of petitioner's witnesses and through the testimony of Ms. Buffalo (Pet. App. 16-17). Petitioner shows no conflict between the result here and this Court's decisions in *Afroyim* and *Vance*.[3]

4. Petitioner also seeks review (Pet. 10-11, 15-16) of the district court's finding that petitioner's passport was invalid within the meaning of 22 C.F.R. 51.4(h). Petitioner argues that there was no evidence that his pass-

---

[3] Petitioner's reliance (Pet. 13-15) on *Rivera* v. *Ashcroft*, 394 F.3d 1129 (9th Cir. 2005), as "analogous" is equally misplaced. *Rivera* involved a petition for a writ of habeas corpus under 28 U.S.C. 2241 challenging the fairness of removal proceedings conducted before an immigration judge. The court of appeals determined that the district court had erred in ruling that it lacked jurisdiction over the habeas petition. *Rivera*, 394 F.3d at 1140. The court ruled that the petitioner had a "colorable citizenship claim" and thus had a "constitutional right to judicial review" that could be obtained through habeas corpus despite the petitioner's failure to appeal the immigration judge's decision. *Id.* at 1137. In so ruling, the Ninth Circuit also offered "some scrutiny of the facts and procedural history of [the] case," including observations that the Immigration and Naturalization Service "took no position" before the immigration judge as to whether the petitioner was a United States citizen and that the immigration judge had acted with partiality and had rejected the petitioner's evidence arbitrarily. *Id.* at 1134-1136. Unlike the facts of *Rivera*, petitioner received a fair and impartial judicial hearing on his claim to United States citizenship, the government investigated and contested petitioner's claim of citizenship, and petitioner received appellate review of the district court's determination. There are simply no analogies to be drawn between petitioner's case and *Rivera*.

port was "registered" as lost under that regulatory provision and asks this Court to decide whether "registration" requires the State Department "to make a list of lost passports" (Pet. 16). That narrow issue is of limited importance and was not raised in the district court or addressed by the court of appeals in its unpublished order of affirmance; this Court's traditional practice therefore precludes certiorari consideration of the argument. See *Gonzales*, 127 S. Ct. at 823. Petitioner also demonstrates no conflict among the circuits on this issue. And as previously discussed, the question whether petitioner's passport was invalid under 22 C.F.R. 51.4(h) was of no consequence in this case, where the evidence credited by the district court established that the passport was issued in error or was obtained by fraud.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

PAUL D. CLEMENT
Solicitor General

JEFFREY S. BUCHOLTZ
Acting Assistant Attorney General

DONALD E. KEENER
JENNIFER J. KEENEY
Attorneys

JANUARY 2008